

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION**

UNITED STATES OF AMERICA

V.

SOUFIANE EL ARCHI

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**CIVIL NO. 1:10CV242-LG
CRIMINAL NO. 1:09CR1-LG-JMR**

**MEMORANDUM OPINION AND ORDER GRANTING IN
PART AND DENYING IN PART MOTION AND
AMENDED MOTION TO VACATE UNDER § 2255
AND DENYING MOTIONS FOR DISCOVERY AND DEPOSITION**

BEFORE THE COURT are Soufiane El Archi's [29] Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody, [36] Amended 28 U.S.C. § 2255 Motion, [43] Motion for Discovery of Specific Investigatory Documents Under Rules Governing § 2255 Proceedings Rules 6(a) and (b), and [44] Motion for Leave to Depose Material Witness. He claims his attorney was ineffective. Among other things, he argues that he requested she file an appeal but she would not. The Government has responded in opposition. The Court has reviewed the parties' submissions, attorneys' affidavits, and the relevant law. The Section 2255 motion and amended motion are granted to the extent that El Archi should be allowed to file an out-of-time appeal. The remainder of the motions are denied without prejudice.

DISCUSSION

El Archi was indicted for knowingly and with intent to defraud, possessing, in and affecting interstate or foreign commerce, fifteen or more access card devices, which were either counterfeit or unauthorized in violation of 18 U.S.C. § 1029(a)(3). On June

26, 2009, he pled guilty. He was sentenced on September 25, to forty-six months in the custody of the Federal Bureau of Prisons, followed by three years of supervised release.

El Archi timely filed the instant petition and amended petition for habeas corpus on May 27, 2010, and September 23, respectively, alleging ineffective assistance of counsel. On January 10, 2011, he filed motions for discovery.

One of the issues raised is that El Archi's attorney was ineffective because she failed to file an appeal when requested. He swears:

3) At the conclusion of the sentencing, I requested my counsel to Notice an Appeal, immediately. Counsel refused, and told me that I waived my right to Appeal. I told counsel that I could not have waived my Right to Appeal issues and arguments that I did not plead to voluntarily, knowingly or intelligently.

4) Counsel Allred was adamant that an Appeal will not be taken.

(Def.'s Decl. at 1-2). The Government presents no controverting evidence and does not oppose the granting of an out of time appeal, although the Government reserves the right to ask the Fifth Circuit to dismiss any appeal based on the plea agreement.

An attorney's failure to file a notice of appeal when requested—even when the right to appeal and collateral review has been waived—is per se ineffective assistance of counsel. *United States v. Tapp*, 491 F.3d 263, 265 (5th Cir. 2007). *Tapp* held:

In such circumstances, if the petitioner is able to demonstrate by a preponderance of the evidence that he requested an appeal, prejudice will be presumed and the petitioner will be entitled to file an out-of-time appeal, regardless of whether he is able to identify any arguably meritorious grounds for appeal that would not be precluded by the terms of his appeal waiver.

Id. at 266. It is undisputed that El Archi requested his attorney to file a notice of

appeal and that she failed to do so. Accordingly, he is entitled to file an out-of-time appeal. Pursuant to the directive in *United States v. West*, 240 F.3d 456 (5th Cir. 2001), El Archi's remaining claims and motions will be dismissed without prejudice and his criminal judgment re-entered. If he wishes to reassert these claims, or others, he may do so by way of a new Section 2255 motion after his appeal is concluded.

IT IS THEREFORE ORDERED AND ADJUDGED that Soufiane El Archi's [29] Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody and [36] Amended 28 U.S.C. § 2255 Motion are **GRANTED** to the extent that he is entitled to file an out-of-time appeal. The petitions are **DISMISSED WITHOUT PREJUDICE** in all other respects.

IT IS FURTHER ORDERED AND ADJUDGED that El Archi's [43] Motion for Discovery of Specific Investigatory Documents Under Rules Governing § 2255 Proceedings Rules 6(a) and (b) should be and is hereby **DENIED WITHOUT PREJUDICE**.

IT IS FURTHER ORDERED AND ADJUDGED that El Archi's [44] Motion for Leave to Depose Material Witness should be and is hereby **DENIED WITHOUT PREJUDICE**.

SO ORDERED AND ADJUDGED this the 1st day of February, 2011.

sl/ *Louis Guirola, Jr.*
LOUIS GUIROLA, JR.
CHIEF U.S. DISTRICT JUDGE